

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAMELA SHEAFFER
Claimant

VS.

HALLMARK CARDS, INC.
Respondent
Self-Insured

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Docket No. 256,471

ORDER

Claimant and respondent appeal the January 11, 2001, Award of Administrative Law Judge Brad E. Avery. Stacy Parkinson has been appointed Board Member Pro Tem in place of Board Member David Shufelt, who has disqualified himself from participating in this matter. Oral argument before the Board was held on July 18, 2001.

APPEARANCES

Claimant appeared by her attorney, Chris Miller of Lawrence, Kansas. Respondent appeared by its attorney, Gregory D. Worth of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations contained in the Award.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment on the date alleged?
- (2) Is claimant entitled to temporary total disability compensation for the period February 18, 2000, through March 20, 2000?
- (3) Is claimant entitled to past medical expense, future medical expense and unauthorized medical expense in this award?

- (4) What is the nature and extent of claimant's injury and/or disability? Claimant was awarded a 7.5 percent permanent impairment to her right knee for the injuries suffered on October 25, 1999. Claimant contends she is entitled to a 10 percent impairment to the right leg. Respondent contends claimant's condition is personal to her and does not stem from her employment with respondent. Therefore, respondent argues benefits should be denied.
- (5) To what extent may Chris D. Fevurly, M.D., consider the medical records of Michael T. McCoy, M.D., when forming his own opinion regarding claimant's condition and whether it was aggravated by her work?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a long-term employee of respondent, having worked for almost 21 years at its Lawrence, Kansas, facility. At the time of her accidental injury, her job title was batch counter operator. She had served in that capacity for 16 years. In April 1999, claimant was assigned to work on new equipment which required a modification of her work activities. While using this equipment, she was required to squat and lift loads of stock and do an increased amount of bending and twisting. Her duties prior to the assignment to the new equipment in April of 1999 did not require squatting.

As a result of those new physical activities required by her job, claimant began experiencing difficulties in both knees. She also developed right leg pain.

Claimant acknowledged at the time of regular hearing that her left knee problem had resolved and there was no claim for any compensation stemming from any left knee complaints. Claimant's claim is limited to a scheduled injury to the right knee.

Claimant was eventually referred to Chris D. Fevurly, M.D., board certified in internal medicine and preventive medicine with a specialization in occupational medicine. Dr. Fevurly is also board certified by the American Board of Independent Medical Examiners.

Dr. Fevurly first saw claimant on November 2, 1999, at which time claimant presented him with a three-month history of right knee pain. He was advised claimant's job required some kneeling and squatting, with increased physical activities beginning in April of 1999. Claimant could recall no specific event or traumatic injury to the right knee.

Dr. Fevurly recommended an MRI of the right knee which was performed on November 12, 1999. The MRI displayed a subchondral defect in the lateral aspect of the

medial femoral condyle and also osteochondritis dissecans. Osteochondritis dissecans is described as a reduction in blood flow to the bone, which is very similar to avascular necrosis in the hip.

Dr. Fevurly testified there was no causal relationship between the development of the osteochondritis dissecans and claimant's job activities. He did acknowledge that any activity which claimant might perform in her day-to-day life, whether it be at work or at home, could exacerbate or aggravate this condition. He felt there was no increased risk from the described work activities, as opposed to any of her usual day-to-day activities, in the development of this condition.

Dr. Fevurly, utilizing the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, found on page 85, table 64, claimant's condition, which he categorized as an undisplaced fracture, resulted in a 5 percent impairment to the lower extremity.

Claimant was, shortly after the accident, referred to Michael T. McCoy, M.D., for surgical treatment of her right lower extremity. However, the medical records of Dr. McCoy were not placed into evidence. Dr. McCoy's deposition was never taken and K.S.A. 44-519 (Furse 1993) prohibits the consideration of those medical records without either Dr. McCoy's testimony or a stipulation by the parties. K.S.A. 44-519, however, does not prevent a testifying physician from considering medical information generated by another absent physician as long as the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician. Roberts v. J. C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997).

Dr. Fevurly does note in his December 16, 1999, office report that Dr. McCoy felt the claimant's osteochondritis dissecans was aggravated by squatting. He went on to state, however, that Dr. McCoy did not note any direct causal relationship between the osteochondritis dissecans and claimant's job duties.

Claimant was referred for an evaluation to board certified orthopedic surgeon Edward J. Prostic, M.D. Dr. Prostic testified that, in the course of his practice, he had performed the type of knee surgery that was performed on claimant. In Dr. Prostic's opinion, claimant's osteochondritis dissecans of the medial femoral condyle was related to and aggravated by the repetitious squatting claimant did at work.

Dr. Prostic was asked to provide an impairment rating for claimant. He testified that the AMA Guides, Fourth Edition, did not address this particular condition and, therefore, one must use one's own training and expertise in order to come up with a reasonable impairment number. In his opinion, he felt claimant had a 10 percent impairment to the right leg as a result of her osteochondritis dissecans.

Dr. Prostic opined that it was more likely than not that claimant's condition was aggravated by her employment. He acknowledged that the work was not the sole cause of her condition, but instead was an aggravation from the repetitious squatting.

Dr. Prostic was asked his understanding of the amount of repetitious squatting required in claimant's employment. He was unable to testify to a specific number, but had been told by claimant that she squatted frequently.

Claimant contends that she is entitled to temporary total disability compensation for the period February 18, 2000, through March 20, 2000. There is, however, no testimony which supports claimant's request. Neither claimant nor any doctor testified that claimant was unable to work during those periods of time for the purpose of receiving treatment for or because of her alleged work-related accidental injury. It is claimant's burden in workers compensation litigation to prove her entitlement to the temporary total disability compensation. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). The Appeals Board finds claimant has failed in this burden. Therefore, claimant's request for temporary total disability compensation is denied. The Award of the Administrative Law Judge in this regard is affirmed, although on other grounds than that discussed by the Administrative Law Judge in the Award.

The Appeals Board finds claimant has proven that she suffered accidental injury arising out of and the course of her employment. The medical evidence is somewhat contradictory regarding whether the osteochondritis dessicans would be aggravated by claimant's work. Both doctors agree the work did not start the problem, but Dr. Prostic testifies that it aggravated the problem. Dr. Fevurly, on the other hand, states almost any activity of claimant's daily life could exacerbate or aggravate the condition. Dr. Fevurly did not, however, say whether the work activities would contribute more to that worsening. From the testimony, the Board concludes that it would.

The Appeals Board finds the testimony of Dr. Prostic, coupled with the testimony of claimant, convincing that there is a relationship between the osteochondritis dessicans and claimant's employment. Claimant's work activities aggravated and accelerated this condition beyond that which would have occurred from the natural aging process or by the normal activities of day-to-day living. An injury is compensable under the Kansas Workers Compensation Act even if the accident only aggravates a preexisting condition. Odell v. Unified School Dist. No. 259, 206 Kan. 752, 481 P.2d 974 (1971); Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

With regard to the nature and extent of injury and disability, the Administrative Law Judge found the opinions of both Dr. Prostic and Dr. Fevurly to be persuasive and combined the 10 percent from Dr. Prostic with the 5 percent from Dr. Fevurly in awarding a 7.5 percent impairment to the body as a whole. There is a substantial dispute between the two doctors regarding the use of the AMA Guides, Fourth Edition. Dr. Prostic testified

that the AMA Guides do not address this particular condition and, therefore, the physician's own expertise must be used in order to properly determine claimant's impairment. Dr. Fevurly, on the other hand, identified table 64, page 85, of the AMA Guides, Fourth Edition, as being the appropriate table to use when computing claimant's impairment. The section identified by Dr. Fevurly deals with supracondylar or intercondylar fractures of the knee. Dr. Fevurly identified claimant's condition as an undisplaced fracture which would result in a 5 percent impairment to the lower extremity. The Appeals Board, however, notes that, while Dr. Fevurly does testify to the inclusion of osteochondritis dessicans in that section, neither the table nor the information discussing the use of the table specifically identifies osteochondritis dessicans as being included. Dr. Fevurly apparently believes that the authors of the AMA Guides intended for there to be an inclusion of osteochondritis dessicans in the supracondylar or intercondylar fracture section, but Dr. Prostic disagrees.

Dr. Prostic elected to use his own expertise and reject table 64 of the AMA Guides, Fourth Edition, in determining claimant's impairment. The Appeals Board is reluctant to reject either medical opinion as both appear to be supported by substantial medical experience in this area. Dr. Fevurly has been trained and is board certified by the American Board of Independent Medical Examiners in the use of the AMA Guides. Dr. Prostic, on the other hand, is a board certified orthopedic surgeon who has a great deal of experience in the use of the AMA Guides and who has also, in his practice, performed the same surgery which was performed on claimant. The Appeals Board, therefore, finds it unreasonable to reject either opinion and, in considering both opinions, finds the Administrative Law Judge's determination that claimant has a 7.5 percent impairment to the right lower extremity at the knee is proper and adopts same as its award in this matter.

The Appeals Board finds claimant entitled to all past medical expense reasonably necessary to cure and relieve claimant from the effects of the injury.

The Appeals Board further finds claimant entitled to future medical treatment for these injuries upon application to and approval by the Director.

The Appeals Board finds claimant entitled to unauthorized medical expense up to the appropriate maximum statutory amount upon presentation of an itemized statement verifying same.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated January 11, 2001, should be, and is hereby, affirmed in all respects. Additionally, the Appeals Board finds claimant entitled

to past medical expenses which are reasonably necessary to cure and relieve claimant from the effects of her injuries.

IT IS SO ORDERED.

Dated this ____ day of August, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Gregory D. Worth, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director